SHAMELIN HOLDINGS SDN BHD

v.

MOHD ANHAR AHMAD

HIGH COURT MALAYA, KUALA LUMPUR
RAUS SHARIF J
[ORIGINATING MOTION NO: R1-24-03-2004]
20 APRIL 2006

ARBITRATION: *Award - Grounds for setting aside award - Whether court has jurisdiction to examine correctness of award on merit - Court's function is not to re-hear matter but to determine whether there is error of law - Whether the arbitrator had properly analysed and appraised evidence - Whether arbitrator had drawn any wrong inference of fact from evidence - Arbitration Act 1952, ss. 21, 24*

ARBITRATION: *Award - Interest - Whether arbitrator has discretion to award pre-award interest - Arbitration Act 1952, s. 21*

CIVIL PROCEDURE: *Interest - Whether awarding of pre-award interest is an established practice having the force of law*

The applicant had appointed the respondent to provide professional architectural services for several projects. Subsequently, the respondent terminated his appointment as the Architect for the projects on the grounds of non payment of fees. The respondent then commenced arbitration claiming for his professional fees. The issues which arose were, *inter alia*, whether there was a collateral agreement whereby payment of the architectural fees was conditional upon the respondent securing an en block purchaser for one of the projects; and whether the respondent had carried out his duties negligently. The arbitrator found in favor of the respondent. The applicant applied under s. 24(2) of the Arbitration Act 1952 ("the Act") to set aside the arbitration award contending that the arbitrator in favouring the respondent had misconducted himself within the meaning of s 24(2) of the Act. The applicant further submitted that the arbitrator had no jurisdiction to award pre-award interest because s. 21 of the Act provides only for post-award interest.

Held (dismissing the applicant's application with costs):

(1) The findings of the arbitrator were findings of facts. It is an established law that in cases of this nature the court's jurisdiction is limited in that it has no jurisdiction to sit in appeal and examine the correctness of the award on merit. The court's function is not to re-hear the matter but to determine whether there is error of law

on the face of the award. Looking at the award as a whole, the arbitrator had properly analysed and appraised the evidence and he had not drawn any wrong inference of fact from the evidence including the documents incorporated in the award. (para 15)

(2) The awarding of pre-award interest is an established practice having the force of law. The arbitrator has the discretion to award pre-award interest. There was no error on the part of the arbitrator when he awarded pre-award interest. (paras 17 & 18)

(3) The arbitrator had not misconducted himself within the meaning of s. 24(2) of the Act, nor was there any error on the face of the award which entitled it to be set-aside. (para 19)

Case(s) referred to:
Chandris v. Isbrandtsen Mooler Co Inc All ER [1950] Vol 2 618 ***(refd)***
Hartela Contractors Ltd v. Hartecon JV Sdn Bhd [1999] 2 CLJ 788 CA ***(refd)***
Intelek Timur Sdn Bhd v. Future Heritage Sdn Bhd [2004] 1 CLJ 743 FC ***(refd)***
Leong Kum Whay v. QBE Insurance (M) Sdn Bhd [2006] 1 CLJ 1 CA ***(refd)***
Lian Hup Manufacturing Co v. Unitata Bhd [1994] 3 CLJ 338 HC ***(refd)***
Raja Lope v. Malaysian Flour Mills Bhd [2000] 6 CLJ 194 HC ***(refd)***
Syarikat Pemborong Petamac & Federal Land Development Authority [1971] 2 MLJ 210 ***(refd)***

Legislation referred to:
Arbitration Act 1952, ss. 21, 24(2), 27

For the applicant - T Gunaseelan; M/s Gunaseelan & Assocs
For the respondent - Ramdas Tikamdas; M/s Siva Ras & Assocs

Reported by Amutha Suppayah

JUDGMENT

Raus Sharif J:

[1] Two originating summons arising from similar facts, involving the same parties were filed before this court. In originating summons No. R1-25-233-03, the application was by Shamelin Holdings Sdn Bhd ("the applicant") under s. 24(2) of the Arbitration Act 1952 ("the Act") to set aside the arbitration award of Mr. Sundra Rajoo ("the arbitrator") made on 18 November 2003. In originating summons No. R1-24-03-04, the application was by Mohd Anhar bin Ahmad (a sole proprietor carrying out the business as ABA Architect) under s. 27 of the Act for leave to enforce the same arbitration award.

[2] It was agreed between the parties that the applicant's application in R1-25-233-03 to be heard first and the decision in that case will bind the respondent's application in R1-24-03-04.

[3] The facts leading to these two applications are as follows. A

[4] By an agreement dated 19 May 1995, the applicant appointed the respondent to provide professional architectural services, for the following projects:

(i) Twin tower of 38 storey consisting of office and hotel ("twin tower project"); B

(ii) A 22 storey office tower, subsequently converted to 15 Storey Hostel Block for Maktab Sains Mara ("hostel project"); and

(iii) Shamelin Management Office ("management office project"). C

[5] On 20 April 1998, the respondent terminated his appointment as the architect for the above projects on the grounds of non payment of fees.

[6] The respondent's claims before the arbitrator were in relation to the bills issued for the professional services rendered by the respondent for the respective projects which are as follows: D

Twin Tower Project

(i) Bill No. 0035 dated 24 April 1998 for RM845,802 E

Hostel Project

(i) Bill No. 0033 dated 8 December 1997 for RM34,049.53; and

(ii) Bill No. 0036 dated 1 July 1998 for RM15,000. F

Management Office Project

(i) Bill No. 0037 dated 1 July 1998 for RM15,000.

[7] The applicant disputed the respondent's claims. The applicant's version was that in early 1995 a consortium comprising of individuals headed by a person by the name of Haji Radzi Haji Wahi, made a representation to the applicant to construct a twin tower building on the applicant's land with a projected profit of RM95 million. Based on the representation, the applicant agreed to appoint the respondent (a member of the consortium) as the architect subject to the condition that the payment of the fees is conditional upon the respondent and the consortium obtaining an en block purchaser for the twin tower project. Since the respondent would not be paid for the twin tower project unless the en block purchaser is found, the applicant appointed the respondent as the architect for the hotel project and the management office project, to assist the respondent. G H I

[8] According to the applicant, the respondent was paid for the bills for the hostel project and management office project. However, no payment was made by the applicant to the respondent in respect of the twin tower project. The applicant maintains that the fees in respect of the architectural works relating to the twin tower project was not due and payable because there was a collateral agreement that an en block purchaser would be secured by the consortium.

[9] In any event, according to the applicant, the works by the respondent in respect of the twin tower project was carried out negligently or not as expected of an architect. In respect of the claim relating to the hostel project and the management office project, the applicant contended that the respondent misrepresented and induced the applicant to release payment of fees in excess of what the respondent was entitled to. Further according to the applicant, the respondent was negligent in executing the architectural work in respect of hotel project and management office project.

[10] The issues for determination before the arbitrator were:

(i) Was there a collateral agreement whereby the respondent promised secure an en block purchaser for the twin towers and that the payment of the architectural fees was conditional upon the respondent securing an en block purchaser for the twin towers:

(ii) Whether the respondent had completed the drawings and documents at a stage ready for submission to the relevant authorities, safe for the final adjustments, coordination and correction to be made;

(iii) Whether the respondent was negligent in carrying his work in relation to the twin towers project, the hotel project and management office project;

(iv) Whether the respondent has by misrepresentation induced the applicant to release payment of fees in excess of what was actually due to the respondent; and

(v) Whether pre-award interest can be awarded.

[11] The arbitrator found in favor of the respondent. Before me it is the contention of the applicant that the arbitrator in favouring the respondent has misconducted himself within the meaning of s. 24(2) of the Act. The applicant further contended that there are errors on the face of the award which merited the award to be set-aside.

[12] With deepest respect, I am unable to hold as such. With regard to the alleged collateral contract, the arbitrator found that the respondent's appointment as the architect for the Twin Tower Project was in pursuant to the agreement dated 19 May 1995. The arbitrator stated that:

> There is no substratum of fact at all for the issue of the alleged 'collateral contract' to be considered. The respondent's assertion of a collateral contract remain bare devoid of any evidence in support of it. It is merely a red hearing and a sham without any substance and foundation whatsoever.

[13] With regard as to whether the respondent has completed the drawings and documents were ready for submission to the relevant authorities, the arbitrator held as follows:

(i) In respect of the twin tower project:

> I have looked at all the evidence given and submitted upon by both parties. In particular, I have considered and evaluated them carefully. I find and hold the Architectural Drawings as produced in CBA 44A sheet 1-17 has reached the stage of practically ready for submission to the relevant authorities as they had reached 80% of Schematic Design Phase.

He further stated:

> I find and hold the said drawings had reached the state practically ready for submission to the relevant authorities. I confirm the veracity of the claimant's evidence on this item.

(ii) In respect of the hotel project:

> I find no reason to doubt the veracity of the figures submitted by the claimant leading to his claims and find that the respondent has not produced any evidence to rebut the claim. Based on the above, I find and hold as regard to the Hostel Project that claimant is entitled to payment of RM34,049.53 *vide* Bill No. 0033 dated 8th December 1997 and RM15,000.00 *vide* Bill No. 0036 dated 1st July 1998.

(iii) In respect of the management office project:

> I find no reason to doubt the veracity of the figures submitted by the claimant leading up to his claims and find the respondent has not produced any evidence to rebut the claim. Based on the above, I find and hold as regard to the Management Office Project that the claimant is entitled to payment of RM15,000.00.

[14] With regard to the alleged negligence of the respondent in carrying his works, the arbitrator held:

> "… I find the Drawings were at a stage ready for submission to the relevant authorities save for some final adjustments, coordination and correction to be made as identified by the claimant in his evidence …". As the claimant is only claiming 75% of the Schematic Design Phase, I find that all these adjustments will be *inter alia* part of the remaining part to be done in the course of the work when the drawings are being submitted to DBKL.

[15] Clearly, the above findings of the arbitrator are findings of facts. It is an established law that in cases of this nature the court's jurisdiction is limited in that it has no jurisdiction to sit in appeal and examine the correctness of the award on merit. The court's function is not to re-hear the matter but to determine whether there is error of law on the face of the award. (See *Syarikat Pemborong Petamac & Federal Land Development Authority* [1971] 2 MLJ 210; *Hartela Contractors Ltd v. Hartecon JV Sdn Bhd* [1999] 2 CLJ 788; *Intelek Timur Sdn Bhd v. Future Heritage Sdn Bhd* [2004] 1 CLJ 743 FC). Thus, looking at the award as a whole, it is my view that the arbitrator has properly analysed and appraised the evidence and he has not drawn any wrong inference of fact from the evidence including the documents incorporated in the award.

[16] Another issue raised by the applicant is the award on pre-award interest. According to the applicant the arbitrator has no jurisdiction to award pre-award interest. This is because of s. 21 of the Act which provides only for post-award interest.

[17] The respondent submitted otherwise. Reference was made to the English Court of Appeal of *Chandris v. Isbrandtsen Mooler Co. Inc.* All ER [1950] Vol 2 618 and the recent case of our Court of Appeal in *Leong Kum Whay v. QBE Insurance (M) Sdn Bhd* [2006] 1 CLJ 1 CA where it was decided to the effect that the awarding of pre-award interest was an "established practice having the force of law".

[18] I have no reason to depart from the principle established in the above two cases. Clearly the arbitrator has the discretion to award pre-award interest. Hence, there is no error on the part of the arbitrator when he awarded pre-award interest. In fact the arbitrator in making the award on pre-award interest was guided by established precedents in the cases of *Lian Hup Manufacturing Co v. Unitata Bhd* [1994] 3 CLJ 338 HC and *Raja Lope v. Malaysian Flour Mills Bhd* [2000] 6 CLJ 194 HC.

[19] In conclusion, I have no reason to interfere with the award of the arbitrator. The arbitrator has not misconducted himself within the meaning of s. 24(2) of the Act, nor there is any error on the face of the award which entitled me to set-aside the award. The applicant's application in R1-25-233-03 is hereby dismissed with costs. Consequently the respondent's application in R1-24-03-04 is allowed with costs.